FEDERAL COURT OF AUSTRALIA

FER17 v Minister for Immigration, Citizenship and Multicultural Affairs [2019] FCAFC 106

Appeal from:	*FER17 v Minister for Immigration & Anor* [2018] FCCA 3767
File number:	SAD 3 of 2019
Judges:	**KERR, WHITE AND CHARLESWORTH JJ**
Date of judgment:	24 June 2019
Catchwords:	**MIGRATION** – whether the meaning of “a national” as appears in the definition of “receiving country” in s 5 of the *Migration Act 1958* (Cth) applies to a person who does not have a present status of a citizen of another country but is capable of acquiring that status – meaning does not apply in such a circumstance **PRACTICE AND PROCEDURE** – discretion of judge not to grant relief notwithstanding jurisdictional error being established – whether appeal governed by principles in *House v The King* [1936] HCA 40; 55 CLR 499 – error of principle established
Legislation:	*Migration Act 1958* (Cth) ss 5, 5H, 5J, 36, 91M, 91N, Pt 7AA *Citizenship Act 1948* (Sri Lanka) s 5(2)
Cases cited:	*FER17 v Minister for Immigration* [2018] FCCA 3767 *Fox v Percy* [2003] HCA 22; 214 CLR 118 *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1 *House v The King* [1936] HCA 40; 55 CLR 499 *Lay Kon Tji v Minister for Immigration & Ethnic Affairs* [1998] FCA 1380; 158 ALR 681 *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239
Date of hearing:	9 May 2019
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Counsel for the Appellant:	Mr S McDonald
Solicitor for the Appellant:	MSM Lawyers
Counsel for the Respondents:	Mr D F O'Leary
Solicitor for the Respondents:	Australian Government Solicitor
Counsel for the Cross-Appellant:	Mr D F O'Leary
Solicitor for the Cross-Appellant:	Australian Government Solicitor
Counsel for the Cross-Respondent:	Mr S McDonald
Solicitor for the Cross-Respondent:	MSM Lawyers

ORDERS

SAD 3 of 2019

BETWEEN:	**FER17** Appellant
AND:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** First Respondent **IMMIGRATION ASSESSMENT AUTHORITY** Second Respondent
AND BETWEEN:	**MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS** Cross-Appellant
AND:	**FER17** Cross-Respondent
JUDGES:	**KERR, WHITE AND CHARLESWORTH JJ**
DATE OF ORDER:	**24 JUNE 2019**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The cross-appeal be dismissed.
3. The orders made by the Federal Circuit Court of Australia on 20 December 2018 be set aside, and in lieu thereof there be orders that:
   (a) an order in the nature of certiorari issue quashing the decision of the Second Respondent dated 31 October 2017.
   (b) the matter be remitted to the Second Respondent for determination according to law.
   (c) the First Respondent pay the Applicant's costs.
4. The First Respondent pay the Appellant's costs of the appeal.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 This is an appeal from a decision of the Federal Circuit Court of Australia (**FCCA**): see *FER17 v Minister for Immigration* [2018] FCCA 3767. In that judicial review proceeding, the primary judge concluded that the Immigration Assessment Authority (**IAA**) had fallen into jurisdictional error in affirming a decision of a delegate of the First Respondent (**Minister**) refusing the Appellant FER17 a Safe Haven Enterprise Visa (**SHEV**). Notwithstanding, his Honour refused the Appellant relief by way of the issue of a constitutional writ on discretionary grounds.

2 The Appellant appeals against the primary judge's exercise of discretion in refusing him relief.

3 The Minister cross-appeals. The cross-appeal puts in issue whether the primary judge was correct in holding that the IAA had fallen into jurisdictional error.

4 The circumstances giving rise to this appeal are unusual.

BACKGROUND

5 The Appellant arrived in Australia by boat in 2013. His SHEV application was advanced on the basis that his mother and father had fled Sri Lanka during the civil war to live in India. He had been born in India in 1998, had never resided in Sri Lanka, and did not have Sri Lankan citizenship. His account referred to his upbringing in India where, as a Tamil, he had suffered racial discrimination and had feared to leave his home other than to attend school.

6 The Appellant expressed fear that were he to be returned to Sri Lanka he would suffer persecution for imputed sympathies towards the Liberation Tigers of Tamil Eelam (**LTTE**). He claimed his father had been gaoled in India for five years on suspicion of being a member of the LTTE.

7 The Minister's delegate in his consideration of FER17's application gave only short attention to the possibility that he might have a valid protection claim with respect to India but concluded that the racial discrimination FER17 claimed to have suffered during his upbringing in India did not rise to a level that would engage protection obligations.

8 The delegate then gave substantive attention to the Appellant's claims to be entitled to protection with respect to Sri Lanka, but ultimately dismissed those claims.

9 The Appellant was automatically referred to the IAA for review as a fast-track applicant under Pt 7AA of the *Migration Act 1958* (Cth) (**Act**).

THE IAA DECISION

10 The IAA dealt with the Appellant's review on the basis that, although FER17 was "a Tamil male born in India", he was a Sri Lankan national.

11 Section 5 of the Act defines "receiving country" to mean:

> (a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
>
> (b) if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

12 The IAA concluded that "Sri Lanka is the receiving country for the purpose of this assessment".

13 The IAA assessed the Appellant's claims for protection exclusively on the premise that he was a national of Sri Lanka. It dismissed FER17's claims for refugee status and complementary protection and affirmed the delegate's decision.

THE FCCA PROCEEDINGS

14 The Appellant, differently advised, then commenced judicial review proceedings in the FCCA. He contended that the IAA had fallen into jurisdictional error by proceeding on the basis that he was a Sri Lankan national and that Sri Lanka was his "receiving country" for the purpose of its review.

15 The primary judge accepted that contention. His Honour held that:

(1) the IAA had misconstrued the relevant law when it had concluded that FER17 was a national of Sri Lanka and that Sri Lanka was his receiving country for the purpose of its review; and

(2) the IAA's error was material to the conclusions reached with respect to the Appellant's protection claims. Consequently, the IAA had fallen into jurisdictional error; but

(3) relief nonetheless was to be refused on discretionary grounds.

16 The first two of those findings are the subject of the cross-appeal in this proceeding. The third finding is the subject of the appeal.

17 The logic of this proceeding is that if the Minister succeeds in his cross–appeal, the Appellant must fail in his appeal. If the Minister fails in his cross-appeal and the Appellant succeeds in his appeal, then his review will be remitted to the IAA for redetermination of his application for protection and a SHEV on the premise that India, not Sri Lanka, is the "receiving country".

18 The primary judge's reasons give a sufficient account of the factual background material to this appeal. There are no facts in dispute critical to its disposition.

19 His Honour reasoned as follows:

> 7. In my view, the material and the application for review raise two related questions: was the Authority in error in concluding that the applicant's "*nationality*" is Sri Lankan and, if so, was that error a jurisdictional error, having regard to its gravity and materiality?
>
> 8. The concept of "*nationality*" arises in a number of ways under the Act. In considering the applicant's refugee claim under section 36(2)(a) regard must be had to section 5H of the Act which defines a person as a refugee if the person:
>
> > *(a) in a case where the person has a nationality – is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or*
> >
> > *(b) in a case where the person does not have a nationality – is outside the country of his or her form habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.*
>
> 9. The meaning of "*well-founded fear of persecution*" in section 5J of the Act also takes up the concept of nationality and provides that a person has a "*well-founded fear of persecution*" if:
>
> > *(a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and*
> >
> > *(b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a);….*
>
> 10. Section 5 of the Act defines "*receiving country*" to mean:
>
> > *(a) a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or*
> >
> > *(b) if the non-citizen has no country of nationality – a country of his or her form habitual residence, regardless of whether it would be possible to return the non-citizen to the country.*
>
> 11. Additionally, Australia may have complementary protection obligations under section 36(2)(aa) of the Act if as a consequence of removing an applicant "*from*

Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm…"

12. The Authority addressed the question of the applicant's nationality at paragraphs [16] to [26] of the reasons. It noted that the applicant was born in India and had received a birth certificate from the government of Tamil Nadu. The certificate stated that the applicant's nationality was "*Sri Lankan*". The applicant also received a "*Refugees of Sri Lanka Identity Card*" issued by the Indian authorities recognising that the applicant was an Indian-born Sri Lankan refugee.

13. In Australia when the applicant lodged his application for a protection visa he stated his citizenship at birth as "*Sri Lanka*" and his current citizenship as "*n/a*". He said he was seeking protection in Australia so he did not have to return to Sri Lanka. In his protection visa interview in February 2017 the applicant was asked about his nationality or country of citizenship and replied "*no country*". He was asked if he was claiming to be stateless. He said "*I was born in India and have no document to state [I am a] citizen of Sri Lanka*". He said his parents had been born in Sri Lanka.

14. At paragraph [22] of the reasons the Authority referred to country information which indicated that:

> *Children born outside of Sri Lanka to Sri Lankan parents are entitled to Sri Lankan citizenship. Parents must register their child's birth within one year of birth for the confirmation of the child's citizenship. A child can still be registered for citizenship after one year of age; however a fine will be imposed. An application is required to be completed and lodged with supporting documents…*

It is apparent from footnote 1 to paragraph [22] that the Authority also had reference to a version of the *Citizenship Act 1948* (Sri Lanka) ("the Citizenship Act") available on the internet.

15. The Authority was satisfied that the applicant had a Refugees of Sri Lanka Identity Card, a marriage certificate for his parents and birth certificate for his mother although his father does not have any Sri Lankan identity documents. The Authority was satisfied that the applicant's father could obtain a copy of his birth certificate. The Authority found that, according to country information, Sri Lankan refugees residing in Tamil Nadu can obtain identity documents from the Sri Lankan High Commission office in Chennai.

16. The Authority accepted that the applicant's birth may not have been registered with the Sri Lankan government but was satisfied that the applicant's birth could be registered and citizenship "*conferred*". The Authority was not satisfied that any "*fine*" imposed would amount to serious harm.

17. The Authority was satisfied that the applicant was born to Sri Lankan citizens and is not stateless but is a national of Sri Lanka.

18. The applicant submitted that this conclusion was not open to the Authority because the Citizenship Act, referred to by the Authority, made it clear that in the case of a person born outside Sri Lanka citizenship required the registration of the birth under section 5 of the Citizenship Act and the applicant's birth had not been so registered.

19. It was agreed between the parties that the question of the determination of the

applicant's nationality must be determined "*solely by reference to the law of that country*" in accordance with the definition of "*receiving country*" in section 5 of the Act.

20. Section 3 of the Citizenship Act provides that "*A citizen of Sri Lanka may, for any purpose in Sri Lanka, describe his nationality by the use of the expression 'Citizen of Sri Lanka*". Accordingly, the Citizenship Act of Sri Lanka appears to treat citizenship and nationality as synonymous. This was not challenged by the Minister.

21. Subsection 5(2) of the Citizenship Act provides as follows:

> *Subject to the other provisions of this Part, a person born outside Sri Lanka on or after the appointed date shall have the status of a citizen of Sri Lanka if at the time of his birth either of his parents is or was a citizen of Sri Lanka and if, within one year from the date of birth, or within such further period as the Minister may for good cause allow, the birth is registered in the prescribed manner:*
>
> *(a) at the office of a consular officer of Sri Lanka in the country of birth; or*
>
> *(b) at the office of the Minister in Sri Lanka.*

22. Although neither party identified "*the appointed date*" for the purposes of subsection 5(2) it appeared to be conceded that the applicant was born after that date.

23. No other sections of the Citizenship Act were identified by the parties as relevant.

24. The applicant said that in the absence of the registration of the applicant's birth under this section he did not have the "*status of a citizen of Sri Lanka*" and this meant that he did not have Sri Lankan nationality.

25. The Minister argued that the applicant had an entitlement to citizenship by virtue of section 5(2) and that the Authority was correct to equate this with "*nationality*".

26. Counsel for the Minister relied on passages from two textbooks: P Weiss, *Nationality and Statelessness in International Law* (London Institute of World Affairs, 1956) and D P O'Connell, *International Law*, *2nd ed* (Stevens & Sons, 1970). Weiss said, at p 3, "*The term "nationality" in the sense in which it is used in this book is a politico–legal term denoting membership of a State.*" The author went on to observe that in those states which have adopted the notion of a "*citizen of the State (as opposed to a 'subject') the terms 'nationality' and 'citizenship' must be regarded as synonymous*". Weiss gave some examples of citizenship and nationality not being synonymous but these were exceptional and related to particular peoples or states at particular times. O'Connell noted, at p 670, that:

> *'Nationality' is a term of art used to denote the primary legal connection between an individual and a State, but it is an inconstant expression employed for different purposes in international law and municipal law, and in different contexts in both.*

27. The applicant did not take issue with these observations. However, the concepts referred to in these texts, while no doubt correct, are of limited

usefulness in my view. Both subsections 36(2)(a) and (aa) ultimately require a refugee claim and a claim for [complementary] protection, in the case of a person who is said to have a nationality of a country, to be assessed by reference to that "*receiving country*" and to be "*determined solely by reference to the law of the relevant country*". If, at the end of that process of determination, it is found that the applicant does not have a nationality the claims are assessed by reference to the country of the applicant's former habitual residence.

28. Whether the applicant was a citizen of Sri Lanka was to be determined solely by reference to the law of Sri Lanka. In my view, the applicant was clearly entitled to seek citizenship of Sri Lanka because he is descended from a Sri Lankan citizen. If his birth was not registered within one year from the date of birth, then the birth can be registered in the prescribed manner "*within such further period as the Minister may for good cause allow*".

29. Although the applicant is entitled to seek citizenship he is not, in my view, a citizen of Sri Lanka until his birth is registered in the prescribed manner. The evidence indicated that has not occurred. Notwithstanding that a Sri Lankan government website suggested that the registration was hardly more than a formality upon payment of a "*fine*" (probably a fee was meant) the fact remains that until registration of the birth in the prescribed manner the applicant is not a citizen of Sri Lanka.

30. The Minister was unable to point to any authority which stated that entitlement to obtain nationality was equivalent to having nationality, although counsel relied on *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 and asserted the case was authority for that proposition.

31. *VSAB* concerned an applicant for refugee protection who asserted that he had a well-founded fear of persecution in Bosnia-Herzegovina. He held a passport for the Former Yugoslav Republic of Macedonia (FYROM) but he asserted that the passport had been obtained fraudulently as a result of a bribe and he was not in fact a citizen of FYROM. The tribunal rejected that claim and found that the applicant was a citizen of FYROM because, among other things, he held a passport, the passport had been renewed and he was, according to the law of FYROM, entitled to citizenship. Both the tribunal hearing an application for review and, later, the Federal Court hearing an appeal referred to evidence that the applicant fulfilled the criteria for and was entitled to citizenship. However, the purpose of referring to this fact was to rebut the applicant's claim that his passport was fraudulently obtained and that he did not hold current citizenship. The fact of his entitlement to citizenship indicated the passport had been properly obtained and that the passport was evidence of existing citizenship of FYROM. *VSAB* did not hold that an entitlement to citizenship was equivalent to citizenship or nationality.

32. I am satisfied that, according to the law of Sri Lanka, the applicant is not a citizen of that country. At most he has an entitlement to citizenship should he apply to register his birth in the prescribed manner and to seek an extension of time in which to do so, should the Minister for good cause allow. I am satisfied the tribunal's conclusion is erroneous, but is this error jurisdictional?

33. In *Hossain v Minister for Immigration and Border Protection* (2018) 359 ALR 1 the plurality (Kiefel CJ, Gageler and Keane JJ) said at [24]:

Jurisdictional error, in the most generic sense in which it has come to

> *be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute to which the decision-maker purported to make it.*

34. At [25] their Honours said:

> *… jurisdictional error is an expression not simply of the existence of an error, but of the gravity of that error.* (Emphasis in original).

35. And at [27] they said:

> *Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction conferred by the statute cannot be answered except by reference to the construction of the statute.*

36. A breach of such a condition does not always lead to jurisdictional error and "*… the statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance*" (at [29])

37. Their Honours went on to say at [30]:

> *Whilst the statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with the condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of open 'the possibility of a successful outcome', or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was 'so insignificant that the failure to take into account could not have materially affected' the decision that was made.*

38. In this case a decision about the applicant's claims required assessment of whether the applicant was a national of Sri Lanka "*determined solely by reference to the law*" of Sri Lanka. In my view, the Authority's conclusion is not consistent with the Citizenship Act of Sri Lanka and therefore must have been determined other than solely by reference to the law of Sri Lanka. The determination is not, therefore, consistent with the statutory condition for the determination.

39. For essentially the same reason, I am also satisfied that the Authority's conclusion that the applicant was a citizen of Sri Lanka lacked a proper and intelligible basis and was thus unreasonable.

> 40. I should refer to the submission of counsel for the Minister that *VSAB* is binding authority for the proposition that the determination of nationality according to foreign law is always a question of non-jurisdictional fact. I reject that submission. The observation to that effect in *VSAB* is an obiter dictum and is, in any event, not easy to reconcile with the High Court's formulation of jurisdictional error as failure to comply with a statutory condition for the decision, combined with an assessment of materiality.

20 The primary judge, having concluded that the IAA had misapprehended its duty, then gave consideration to whether the error made by the IAA was material. His Honour concluded it was.

21 The Minister's cross-appeal, assuming the primary judge's reasoning is otherwise correct, does not assert that the error made by the IAA was not jurisdictional due to a lack of materiality.

22 Notwithstanding that the primary judge had found that the IAA had fallen into jurisdictional error, his Honour declined, in the exercise of his discretion, to grant the Appellant the relief to which he otherwise would have been entitled. His Honour's reasons for declining to grant relief were as follows:

> 48. The judgment of Edelman J in *Hossain* [*v Minister for Immigration and Border Protection* (2018) 359 ALR 1] refers to the residual discretion to refuse a writ of certiorari. This is different to the test of materiality. At [30] his Honour said:
>
>> *There has long been a residual discretion to refuse to issue a writ of certiorari even where a jurisdictional error is established. In R v Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd, this Court said that the discretion might be exercised to refuse a writ of certiorari 'if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made'. Reference to the potential exercise of discretion where no useful result could ensue thus looks forward to the utility of another hearing. Although the residual discretion is not confined to being 'forward looking', it contrasts with the usual consideration of materiality, discussed above, which looks backwards to whether the error would have made any difference to the result.*
>
> 49. I raised with counsel for the applicant my concern that the applicant had not made a claim in relation to India in his submission to the Authority. Counsel appeared to imply that this was the result of misunderstanding or oversight by the applicant's migration agent. He submitted, in substance, that the applicant's failure to make any claim about India to the Authority should be of no concern to the court and it was enough to show that the Authority had committed jurisdictional error. The applicant would have the opportunity to raise any claims about India on a rehearing and they could be examined by the Authority then. I am unable to accept that the ambit of the court's consideration is as limited as this submission implies.
>
> 50. In my view, the applicant's claim to this court lacks merit. Although the

Authority has failed to comply with the statutory condition for the assessment or identification of the relevant "*receiving country*" the applicant has never prosecuted a substantial claim in respect of India. His claims to have a well-founded fear of persecution and a real risk of suffering significant harm have been in relation to Sri Lanka. His claims of "*problems*" in India were considered by the delegate and found to lack real substance. The applicant failed to make any claims in relation to India in his submission to the Authority. Where the applicant has not made any substantial claims in relation to India but instead focused on Sri Lanka, a belated claim in the application for review to this court, one not made previously, that India ought to have been the country of reference considered by the Authority appears to me to lack genuineness or good faith. For that reason, while I find there has been jurisdictional error, I decline, as a matter of discretion, to grant the applicant relief.

THE APPEAL AND THE CROSS-APPEAL

23 It is convenient now to set out the respective grounds of the appeal and cross-appeal.

The grounds of appeal

24 FER17's grounds of appeal are as follows:

1. The Federal Circuit Court Judge erred in finding (at [50]) that:

    a. the Appellant's claim to the Federal Circuit Court "lacked merit", when the Federal Circuit Court had correctly found that the Appellant had established jurisdictional error in the decision of the Independent Assessment Authority, with the consequence that the Authority had applied the wrong statutory test and considered the Applicant's application for a protection visa against the wrong country of reference;

    b. the Appellant had not previously (ie, before the Independent Assessment Authority) made a claim that India ought to have been the country of reference, when the Appellant's submissions to the Independent Assessment Authority had expressly contended that the Appellant did not have a country of nationality, from which it followed that India, and not Sri Lanka, was the relevant country of reference and, in any event, the Independent Assessment Authority itself had identified that issue as a real issue and had addressed it at length and determined it in a manner that involved jurisdictional error; and

    c. the Appellant's claim that India was the country of reference "lack[ed] genuineness or good faith", when:

        i. there was no basis for any such finding;

        ii. the facts necessary to support such a finding were not established clearly (or at all); and/or

        iii. the Appellant's claim was actually correct.

2. The decision of the Federal Circuit Court to refuse relief in the exercise of its discretion involved a denial of procedural fairness to the applicant by reason of the following:

a. the Respondent had never contended that relief should be refused in the exercise of the Court's discretion;

b. the Appellant was not aware that such an issue arose in the proceedings until, at least, after the evidence had closed;

c. the prospect of the Court finding that the Appellant's claim or contention regarding the country of reference "lack[ed] genuineness or good faith" and/or treating this as a basis for refusing relief was not clearly raised prior to the delivery of judgment;

d. the Appellant had no opportunity to adduce evidence relevant to the basis on which the Court decided to refuse relief and, in particular, on the issue of whether the Appellant's claim "lack[ed] genuineness or good faith" or, to the extent that the claim was not given greater emphasis earlier, the reasons why that was so and the Appellant's state of mind.

3. Further and in any event, the exercise of the Court's discretion miscarried:

a. by reason of the matters identified in relation to grounds 1 and 2 above (and each of them);

b. because the effect of refusing relief was that the Appellant's protection visa application would never be assessed according to law and, in particular, by reference to the correct receiving country as required by law; and

c further and in any event, because the discretion should properly have been exercised in favour of granting, rather than refusing, relief.

The grounds of cross-appeal

25 The Minister's grounds of cross-appeal are as follows (unaltered):

2. The primary judge erred by holding:

2.1. that the Immigration Assessment Authority **(IAA)** erred in determining the appellant's nationality by:

2.1.1 misapplying the definition of 'receiving country' in s 5 of the *Migration Act* 1958 (Cth) by not determining whether the appellant was a national of Sri Lanka 'solely by reference to the law' of Sri Lanka

2.1.2. unreasonably concluding that the appellant was a citizen of Sri Lanka, when there was no proper and intelligible basis for that conclusion to be made

2.2. that *VSAB v Minister for Immigration and Indigenous Affairs* [2006] FCA 239 ***(VSAB)*** was not binding authority for the proposition that the determination of nationality according to foreign law is always a question of non− jurisdictional fact

2.3. that the type of error identified was jurisdictional error

2.4. that, in all the circumstances, no order for costs should be made.

3. The primary judge should have held that:

3.1. the IAA did not err in determining the appellant's nationality as:

3.1.1. the IAA did not misapply the relevant statutory condition: *VSAB* at [57]; *Applicants in V 722 of 2000 v Minister for Immigration & Multicultural Affairs* [2002] FCA 1059 at [33]

3.1.2. there was an intelligible justification for the IAA's reasoning, which was within the bounds of reasonableness: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332; *Stretton v Minister for Immigration and Border Protection* (2016) 237 FCR 1; and *Minister for Immigration and Border Protection v SZVFW* [2018] HCA 30 at [68]

3.2. even if the IAA erred in determining the appellant's nationality, the determination of nationality is not a question of jurisdictional fact: *VSAB v Minister for Immigration and Indigenous Affairs* [2006] FCA 239 at [46] and [59] and any error was therefore not a jurisdictional error: *SFGB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 77 ALR 402 at [20]; *Attorney−General (NSW) v Quin* (1990) 170 CLR 1 at 35−36

3.3. the present appellant should pay the first respondent’s costs.

26 Because the Appellant’s appeal becomes moot if the Minister’s cross-appeal is upheld, it is appropriate to address the Minister’s cross-appeal first.

Statutory framework

27 To understand the submissions that follow, it is convenient at the outset to set out the text of the several provisions of the Act in which the words “national” or “nationality” appear as relevant to the assessment of a protection claim.

28 Section 36(2) provides as follows:

36 Protection visas – criteria provided for by this Act

…

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa of the same class as that applied for by the applicant; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa of the same class as that applied for by the applicant.

29 While s 36(2) does not include the words "nationality" or "a national", its reference to a person in respect of whom Australia has protection obligations "because the person is a refugee" imports the meaning of "refugee" as defined by s 5H of the Act. That section provides:

5H Meaning of *refugee*

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a *refugee* if the person:

(a) in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

(b) in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Note: For the meaning of ***well-founded fear of persecution***, see section 5J.

(2) Subsection (1) does not apply if the Minister has serious reasons for considering that:

(a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(b) the person committed a serious non-political crime before entering Australia; or

(c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

30 In turn, the phrase "well-founded fear of persecution" as appears in s 5H is defined by s 5J of the Act as follows:

5J Meaning of well‑ founded fear of persecution

(1) For the purposes of the application of this Act and the regulations to a particular person, the person has a well‑ founded fear of persecution if:

(a) the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; and

(b) there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and

(c) the real chance of persecution relates to all areas of a receiving country.

Note: For membership of a particular social group, see sections 5K and 5L.

(2) A person does not have a well‑founded fear of persecution if effective protection measures are available to the person in a receiving country.

Note: For effective protection measures, see section 5LA.

(3) A person does not have a well‑founded fear of persecution if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:

(a) conflict with a characteristic that is fundamental to the person's identity or conscience; or

(b) conceal an innate or immutable characteristic of the person; or

(c) without limiting paragraph (a) or (b), require the person to do any of the following:

(i) alter his or her religious beliefs, including by renouncing a religious conversion, or conceal his or her true religious beliefs, or cease to be involved in the practice of his or her faith;

(ii) conceal his or her true race, ethnicity, nationality or country of origin;

(iii) alter his or her political beliefs or conceal his or her true political beliefs;

(iv) conceal a physical, psychological or intellectual disability;

(v) enter into or remain in a marriage to which that person is opposed, or accept the forced marriage of a child;

(vi) alter his or her sexual orientation or gender identity or conceal his or her true sexual orientation, gender identity or intersex status.

(4) If a person fears persecution for one or more of the reasons mentioned in paragraph (1)(a):

(a) that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and

(b) the persecution must involve serious harm to the person; and

(c) the persecution must involve systematic and discriminatory conduct.

(5) Without limiting what is serious harm for the purposes of paragraph (4)(b), the following are instances of serious harm for the purposes of that paragraph:

(a) a threat to the person's life or liberty;

(b) significant physical harassment of the person;

(c) significant physical ill‑ treatment of the person;

(d) significant economic hardship that threatens the person's capacity to subsist;

(e) denial of access to basic services, where the denial threatens the person's capacity to subsist;

(f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.

(6) In determining whether the person has a well‑ founded fear of persecution for one or more of the reasons mentioned in paragraph (1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

31 The phrase "receiving country" in s 5J is also a defined term. That expression is defined in s 5 to mean:

(a) a country of which the non‑ citizen is a national, to be determined solely by reference to the law of the relevant country; or

(b) if the non‑ citizen has no country of nationality—a country of his or her former habitual residence, regardless of whether it would be possible to return the non‑ citizen to the country.

32 Certain other provisions of the Act then operate, in particular circumstances, to exclude Australia's protection obligations in respect of certain non-citizens.

33 Thus, s 36(3)-(7) provide:

36 Protection visas—criteria provided for by this Act

..

Protection obligations

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or

herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

34 Sections 91M and 91N provide as follows:

91M Reason for this Subdivision

This Subdivision is enacted because the Parliament considers that a non-citizen who can avail himself or herself of protection from a third country, because of nationality or some other right to re-enter and reside in the third country, should seek protection from the third country instead of applying in Australia for a protection visa, or, in some cases, any other visa. Any such non-citizen who is an unlawful non-citizen will be subject to removal under Division 8.

Note: For protection visas, see section 36.

91N Non-citizens to whom this Subdivision applies

(1) This Subdivision applies to a non-citizen at a particular time if, at that time, the non-citizen is a national of 2 or more countries.

(2) This Subdivision also applies to a non-citizen at a particular time if, at that time:

(a) the non-citizen has a right to re-enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country (the ***available country***) apart from:

(i) Australia; or

(ii) a country of which the non-citizen is a national; or

(iii) if the non-citizen has no country of nationality—the country of which the non-citizen is an habitual resident; and

(b) the non-citizen has ever resided in the available country for a continuous period of at least 7 days or, if the regulations prescribe a longer continuous period, for at least that longer period; and

(c) a declaration by the Minister is in effect under subsection (3) in relation to the available country.

(3) The Minister may, after considering any advice received from the Office of the United Nations High Commissioner for Refugees:

(a) declare in writing that a specified country:

(i) provides access, for persons seeking protection, to effective procedures for assessing their need for protection; and

(ii) provides protection to persons to whom that country has protection obligations; and

(iii) meets relevant human rights standards for persons to whom that country has protection obligations; or

(b) in writing, revoke a declaration made under paragraph (a).

(4) A declaration made under paragraph (3)(a):

(a) takes effect when it is made by the Minister; and

(b) ceases to be in effect if and when it is revoked by the Minister under paragraph (3)(b).

(5) The Minister must cause a copy of a declaration, or of a revocation of a declaration, to be laid before each House of the Parliament within 2 sitting days of that House after the Minister makes the declaration or revokes the declaration.

Determining nationality

(6) For the purposes of this section, the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

THE CROSS-APPEAL

The confined scope of the cross-appeal

35 It is uncontentious that the primary judge proceeded on the basis that “the question of the determination of the Appellant’s nationality must be determined ‘solely by reference to the law of that country’ in accordance with the definition of ‘receiving country’ in section 5 of the

Act”. The primary judge recorded at [19] that that proposition had been “agreed between the parties”.

36 Although the terms of grounds 2.1 and 3.1 of the Minister’s cross-appeal appear to put the correctness of that agreed proposition in issue, Mr O’Leary (who appeared on the Minister’s behalf) disavowed such an intention.

37 The Minister was not contending that the primary judge had proceeded on an erroneous misunderstanding of Sri Lankan law.

38 Rather, Mr O’Leary submitted, the error sought to be identified by those grounds was that his Honour had misconstrued the expression “a national” in the definition of the term “receiving country” in s 5 of the Act.

39 Mr O’Leary submitted that the term “a national” as appears in that definition, properly construed, is to be understood as a reference not only to a person possessing an existing status consistent with that description (whatever bundle of rights may be attached to that status) but also to a person possessing a present capacity to acquire that status.

40 The Minister’s submissions were that, in applying the concept of “a national”, properly construed, it had not been open to the primary judge to have concluded that the IAA had erred in law in finding that FER17 was “a national” of Sri Lanka.

41 That is so, counsel submitted, because if FER17 has a present capacity to acquire Sri Lankan citizenship, he is, for the purposes of the definition of a “receiving country”, a “national” of Sri Lanka.

42 The Minister contended that the primary judge ought to have found that, determined solely by reference to the law of Sri Lanka, FER17 does have a present capacity to become a Sri Lankan citizen. The primary judge had erred by restricting his enquiry to whether or not FER17 had possessed the status of a citizen of Sri Lanka at the time of the IAA decision. He had therefore failed to give relevant attention to s 5(2) of the *Citizenship Act 1948* (Sri Lanka), which read:

> Subject to other provisions of this Part, a person born outside Sri Lanka on or after the appointed date shall have the status of a citizen of Sri Lanka if at the time of his birth either of his parents is or was a citizen of Sri Lanka and if, within one year from the date of birth, or within such further period as the Minister may for good cause allow, the birth is registered in the prescribed manner:
>
> (a) at the office of a consular officer of Sri Lanka in the country of birth; or
>
> (b) at the office of the Minister in Sri Lanka.

43 Mr O'Leary submitted that, on the facts found by the IAA, and on the country information before it, had FER17 applied for registration of his birth, lodged the required supporting documents at the office of a consular officer in the country of his birth (India) and paid a "fine" he would have secured waiver of the time limit referred to in s 5(2). He would have become a citizen of Sri Lanka.

44 Determined "solely by reference to the law of [Sri Lanka]" having regard to the provisions of that law as in evidence before the primary judge, Mr O'Leary submitted that FER17 had been capable of acquiring Sri Lankan citizenship.

45 Mr O'Leary submitted that FER17's capacity to acquire Sri Lankan citizenship meant he should have been found to be "a national" of that country for the purposes of determining his "receiving country", and for the purposes of assessing his claims for protection pursuant to ss 36(2) and (2A) of the Act when read in conjunction with ss 5H and 5J.

46 It is, Mr O'Leary accepted, an exceedingly narrow point.

The parties' submissions on the cross-appeal

47 As to that narrow point of statutory construction, the parties were agreed, and the Court accepts, that neither "a national" nor "nationality" as those expressions appear in the relevant sections of the Act as reproduced above are defined terms.

48 Both parties also agreed, and the Court accepts, that words appearing in an Act of the Australian Parliament must have an ascertainable and fixed meaning. That meaning must be ascertained as an aspect of Australian domestic law.

49 Neither Mr O'Leary nor Mr McDonald (who appeared for the Appellant) submitted that the meaning to be ascribed to those words was open to be determined other than by the application of orthodox principles of statutory interpretation.

50 However, in light of the narrow point of construction ultimately advanced, neither sought to press any submission seeking to identify the precise bounds and limits of what was encompassed within the meaning of "a national" or "nationality" for the relevant purposes of the Act, properly construed as a matter of Australian domestic law.

51 Mr McDonald confined himself to the submission that the words "a national" and "nationality" must have a minimum content such that, although the laws of another country might refer to a

person possessing a lesser bundle of rights as its national, such a person would not be "a national" for the purposes of the Act.

52 Mr O'Leary did not contest that proposition. However, consistently with the contentions he was advancing on behalf of the Minister, he submitted that "nationality" must be understood as conveying a broader notion than citizenship:

> [Nationality] is trying to speak to a range of international situations where citizenship won't actually be the identity of a person's status, that is, for a particular country might not denote someone as citizen, so it has got to deal with that.

53 The term "a national" for the purposes of the Act, Mr O'Leary submitted, was, properly construed, to be understood as applying to a person who had the capacity or right to acquire such a status (as was the case of FER17 with respect to Sri Lankan citizenship) pursuant to the laws of another nation.

54 Mr O'Leary submitted that the construction so advanced was consistent with the purpose intended to be served by the relevant provisions of the Act which refer to "a national" and "nationality":

> It would be far more practical and efficient to determine a protection claim by reference to a country – the receiving country of a person whose status, if their citizenship – if they took that step that wasn't taken in this case, rather than determining – using the fallback position, the habitual residence because it is, in a case such as the present, more likely to be the fact that if a person has that form of legal belonging, just short of actually having the actual citizenship itself which – so short of that [sic] taking that final step of putting the application in, that that would be much more predictive and appropriately predictive of the practical assessment of the person's protection claims than one where they had no rights and, indeed, at least in this case, had made, I guess, oblique references to fear but no real claim to be assessed against their habitual residence.
>
> So in my submission to – the answer is both practical and also clearly pragmatic in light of both the variety of situations in which someone's status comes to be identified in the international arena.
>
> So that's point 1, and point 2 is that it will be more productive to identify – and in my submission, it would be more certain, to identify the receiving country by reference to a person who is capable under the law of that receiving country of being a citizen and therefore would be the country that their protection claim would be assessed against. I can't put it any higher than that.

55 In his reply Mr McDonald joined issue with that contention.

56 Mr McDonald submitted that, whatever minimum bundle of rights would be sufficient for a person actually possessed of such rights to fall within the description of "a national", there was nothing in the Act to suggest that the terms "a national" or "nationality" were open to be

understood as applying to anything other than an existing status as recognised by the law of another country.

57 A person merely capable of later acquiring such a status by reason of some future step or steps required of them (and the recognition of those steps by another country) was not, within the meaning of the Act, "a national". There was nothing in the Act to suggest the words "a national" or "nationality" as appear in the relevant provisions were to be given other than their ordinary grammatical meaning.

58 As to the Minister's proposition that the purpose intended to be served by the relevant provisions supports the Minister's contentions, Mr McDonald submitted:

> …the very difficulty in identifying the relevant test; is it legal entitlement, a practical entitlement having regard to the law of another state, capacity to apply for a citizenship, capacity to have the citizenship granted upon the exercise of a discretion… is a matter telling against it. The fact that there is the fall-back of habitual residence means that there is no reason to expect that nationality isn't used in its normal sense to mean a person with the status of a national according to the law of that country, meaning a citizen or a subject.
>
> The obvious reason for picking the word "nationality" rather than citizenship is because many countries do not describe their – or historically at least did not describe their nationals as citizens but as subjects. And nationality is a well-accepted term that picks up both of those different domestic law concepts. So the other point that I should make about the language of section 5H and refugee … – is that that is language that comes straight out of the Refugee Convention. It's not a question of just construing it in the context of the Migration Act. It's clearly intended to pick up the definition of refugee in article 1 of the Refugee Convention which refers to a person who has a nationality or if the person does not have a nationality, a country of habitual residence.

Consideration

59 In *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 (***SZTAL***), Kiefel CJ, Nettle and Gordon JJ stated at [14]:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
>
> (Citations omitted.)

60 We are satisfied that we should proceed in the manner identified by the plurality in *SZTAL.*

The ordinary meaning of text of the statute

61 The Macquarie Dictionary defines the word "national", used as a noun, as "a citizen or subject of a particular nation, entitled to its protection". It defines nationality as "the quality of membership in a particular nation (original or acquired)": see *Macquarie Dictionary* (5th ed, Macquarie Dictionary Publishers Pty Ltd, 2009).

62 Those definitions refer to a status actually and presently held by a person.

63 All of the statutory provisions set out above, relating to the assessment of a protection claim, refer in the present tense to the possession of such a status:

- Section 5 refers to a country of which the non-citizen "is a national";
- Section 5H refers to the case where a person "has a nationality";
- Section 36(3) refers to "countries of which the non-citizen is a national";
- Section 91M uses the phrase "because of nationality"; and
- Section 91N refers to a circumstance where at a particular time, "the non-citizen is a national of 2 or more countries".

64 As a matter of textual analysis, applying the ordinary and natural grammatical meaning of their words, we are satisfied that there is no basis on which to construe those provisions as extending to any status that a person does not presently possess. Instead, on their ordinary and natural meaning, the words "national" and "nationality" refer to a status presently possessed. They do not encompass a status capable of being sought and acquired, but which is not presently held.

Might Parliament have used those words having regard to their possessing a different technical legal meaning?

65 As *SZTAL* posits, considerations of context and purpose recognise that in an enactment's statutory, historical or other context, some other meaning of a word may be suggested, and that meaning may prevail over its ordinary meaning.

66 However, the Court discerns nothing in the history of the usage of the words "national" and "nationality" (whether at common law or in international law) as would provide a plausible basis for the contention that the Parliament should be understood to have intended those words to apply other than in their ordinary and natural sense. There is nothing to suggest those words might have a different technical legal meaning, which the Parliament might be thought to have adopted, as would apply to a status capable of being, but not as yet, acquired.

67 Thus Finkelstein J observed in *Lay Kon Tji v Minister for Immigration & Ethnic Affairs* [1998] FCA 1380; 158 ALR 681 at 686 (***Lay Kon Tji***):

> According to the common law whether a person is a national of a state is determined by the municipal law of that state: *The King v Burgess; ex parte Henry* [1936] HCA 52; (1936) 55 CLR 608 at 649; *Sykes v Cleary No.2* [1992] HCA 60; (1992) 176 CLR 77 at 105-106. There are qualifications to this rule. One is where the person on whom nationality is conferred has no connection or only a slender connection with the foreign state: *Oppenheimer v Cattermole (Inspector of Taxes)* [1976] AC 249 at 277; *Sykes,* supra, at 112. In that circumstance the common law would not require recognition to be given to the municipal law of the foreign state. There are other circumstances where public policy may produce the same result as, for example, where a foreign hostile power seeks to change the status of an enemy alien: see *Sykes,* supra, at 112-113.
>
> Customary international law also proceeds on the basis that questions of nationality are determined by the municipal laws of each state. Mr I Brownlie in his text "Principles of Public International Law" (4th ed) at 381 refers to this as the accepted view. Conventional international law is to the same effect. In 1925 the Council of the League of Nations established a committee and charged it with the task of preparing a code for the regulation of nationality. The Committee drew up the Convention on Certain Questions Relating to the Conflict of Nationality Laws (the Hague Convention) signed at the Hague in 1930 but which did not enter into force until 1937. The following Articles of the Hague Convention are relevant to the present discussion:
>
> *"Article 1*
>
> *"It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States insofar as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality."*
>
> *Article 2*
>
> *"Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State."*

68 Similarly, in *VSAB v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCA 239 (***VSAB***), Weinberg J observed at [50]:

> One of the terms that is often used synonymously with "nationality" is "citizenship". It has become usual to employ the term "citizen" instead of "subject" in States that adopt a republican form of government. In Sykes v Cleary, Brennan J observed at 109, in relation to the expression "subject or citizen of a foreign power" in s 44(i) of the Commonwealth Constitution,
>
>> subject being a term appropriate when the foreign power is a monarch of feudal origin; citizen when the foreign power is a republic.

The mischief rule – the Minister's purpose submissions

69 In support of the Minister's contention that the context or purpose of the relevant provisions of the Act supplied a good reason to give the word "national" in the definition of "receiving country" a meaning extending beyond its ordinary and natural meaning, Mr O'Leary submitted that there were pragmatic and practical reasons why it would be desirable to do so. Giving the

text such a construction would, he submitted, be consistent with the purpose intended to be served by the relevant provisions of the Act.

70 However, Mr O'Leary did not refer the Court to anything in the text of the statute as might point to the Parliament having identified a relevant mischief, in light of which the term should be so construed.

71 The Court is satisfied that the meaning submitted for by the Minister finds no footing in the text of the statute. As Mr McDonald submits, if nationality is not established then the definition of "receiving country" in s 5 of the Act provides a fall-back alternative: "habitual residence". We accept that submission. Given that Parliament has expressly provided for that specific eventuality, there is no reason inherent in the text to find that pragmatic considerations require this Court to construe the words "a national" and "nationality" in the relevant provisions other than in their ordinary and natural sense.

72 Moreover, other textual considerations point to contrary. The provisions of s 36(3)-(7) and s 91N(2) provide specific exceptions to Australia's protection obligations if, in the circumstances they refer to, a person has a lesser right than nationality as would enable them to safely enter and reside in a third country.

73 Section 91N(2) does not operate to deem a person falling within its terms (a person having the right to re-enter and reside in another country) to be a national of that country. It provides only that s 91N "also applies" to such a person. Moreover, s 91N(2)(a)(ii) expressly dis-applies the provision in so far as it might have application to a country of which a non-citizen is a national. To the extent that a different conclusion might be faintly arguable in the face of those obstacles (which we would reject), the operation of s 91N is confined by s 91N(7).

74 Nor did Mr O'Leary refer the Court to any extrinsic explanatory materials as would support the Minister's submission that the statute ought to be construed on the premise that its terms were directed to addressing a particular mischief.

75 Without a foundation in the text or in any explanatory materials, there is no reason to construe the text other than consistently with its ordinary and natural meaning. It is not necessary to add any gloss to the language of the relevant provisions of the Act. The words used are plain and simple English.

76 We therefore think it unnecessary to give consideration to the responsive submission made by Mr McDonald, namely that the difficulty in identifying the relevant test for determining

"nationality" on the Minister's reading of the Act itself weighed against the proposition advanced.

The Court should decline to address wider issues

77 Having regard to the narrow point that was argued before this Court it is both unnecessary and undesirable for us to venture any concluded view as to the correctness or otherwise of the Minister's submission that for the relevant purposes of the Act, "nationality" must have a wider meaning than citizenship. It is sufficient to note that the correctness of that proposition is not self-evident, having regard to the observations of Finkelstein J in *Lay Kon Tji* and of Weinberg J in *VSAB* in the passages cited above. The resolution of that point should await decision in a case that requires it to be addressed.

Cross-appeal challenging legal error cannot succeed

78 Once it is accepted that the meaning of "a national" and "nationality" for the relevant purposes of the Act, properly construed, does not extend to a person who is not presently a national of another country (understood in its ordinary sense) but who might have, or has, the capacity to acquire that other country's citizenship, it is clear that the Minister's cross-appeal cannot succeed.

79 The primary judge was correct to have held that the IAA had fallen into legal error by applying a wrong test in concluding that FER17 was a national of Sri Lanka.

80 The primary judge's finding that the IAA had erred in law in that regard then required his Honour to give consideration to whether the error was jurisdictional. He concluded it was.

Submission that error not jurisdictional rejected

81 Ground 2.2 of the Minister's cross-appeal asserts that his Honour erred by holding that *VSAB* was not binding authority for the proposition that determining nationality according to foreign law is always a question of non-jurisdictional fact.

82 The Minister's written and oral submissions do not directly address that ground. Instead, at [32]-[35] under the heading "Alternative ground – error not jurisdictional", the Minister's written submissions advance a different proposition to the effect that the IAA's finding concerning the question of the Appellant's nationality was open to be made on the materials before it.

83 In our opinion, that is simply another way of rearticulating the proposition that it had been lawful for the IAA to find that the Appellant was a national of Sri Lanka. That is a proposition the Court has rejected, for the reasons set out above.

84 The primary judge's reasoning as to whether the error went to jurisdiction was entirely orthodox. His Honour relied on the reasoning of the plurality (Kiefel CJ, Gageler and Keane JJ) at [24] in *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34; 359 ALR 1 (***Hossain***) for that purpose. His Honour correctly applied the relevant test.

Cross appeal must be dismissed

85 The Court rejects the proposition that applying the wrong law with respect to a person's nationality when determining his or her application for a protection visa is not a failure to comply with a statutory precondition or condition. The correct characterisation of a person's nationality is fundamental. The IAA's decision thereby lacked an essential characteristic necessary for that decision to be given force and effect by the statute pursuant to which the decision-maker purported to make it.

86 The Minister's cross-appeal must be dismissed.

THE APPEAL

The parties' submissions on the appeal

87 The Appellant's written submissions in support of his appeal were as follows:

> **The appeal — error in finding that the appellant's "claim" on judicial review lacked "genuineness or good faith", denial of procedural fairness and miscarriage of discretion**
>
> 30. Judge Young found that the appellant's claim to the Federal Circuit Court "lacks merit". It is difficult to understand this conclusion, given that the appellant's grounds of review were held to be established. The judicial review application plainly did not "lack merit".
>
> 31. Judge Young further found that the appellant had made "a belated claim in the application for review to this court, one not made previously, that India ought to have been the country of reference considered by the Authority". This was, with respect, an unfair characterisation. The essential contention was that the appellant was not a national of Sri Lanka. That very issue had been raised by the appellant himself at the protection interview and the claim that he was "stateless" had been identified by the appellant, in his submissions to the IAA, as an error in the decision of the delegate. The inescapable legal consequence of that contention was that India was the relevant "receiving country" and the country against which the protection criteria must be assessed.
>
> 32. Judge Young concluded that the "claim" that India was the relevant country

"appear[ed] to [his Honour] to lack genuineness or good faith". But the consequence that India was the relevant country for the purposes of assessing a protection visa application follows as a matter of law from the conclusion that the appellant is not a national of Sri Lanka. The appellant claimed to have suffered discrimination in India and to have left India because it was "not safe" to remain there. Once his true nationality status was identified, the delegate and IAA inevitably had to consider his situation by reference to India, irrespective of whether or not that had hitherto been recognised by his then advisers.

33. The protection visa application and the submissions to the IAA were obviously prepared for the appellant on the basis that it was believed that the relevant reference country was Sri Lanka. The obvious inference was that, even though the appellant maintained that he was not a national of Sri Lanka, those representing him earlier had not appreciated the legal consequence of this; not that the appellant held no fear in respect of India or that the judicial review application was made otherwise than "genuinely" or in "good faith".

34. There was, it is respectfully submitted, no evidence from which it could reasonably be concluded that either the appellant personally or his legal representatives on the judicial review application had acted otherwise than in "good faith". There was no proper basis to find that the application for judicial review lacked good faith or genuineness. Such an allegation is a serious one, which must be both distinctly made and clearly proved. The allegation was neither pleaded at all nor identified by the Judge.

35. Had the correct issue been identified by the delegate, there can be no serious doubt that the appellant's claims with respect to India would have been considered by the IAA, he would very likely have been invited to elaborate upon his experiences in India, and reference would have been made to country information regarding the treatment of Sri Lankan Tamil refugees in India. As it was, neither the delegate nor the IAA considered any country information concerning India. The appellant's evidence plainly raised issues concerning fears of harm in India, and it is apparent that the reasons his "formal claims" were not advanced by reference to India was that he or his advisers had proceeded on the assumption that the relevant country for the appellant was Sri Lanka.

36. Moreover, the basis on which Judge Young dismissed the application for judicial review constituted a denial of procedural fairness to the appellant. The respondent had never contended that the application for judicial review should be refused on discretionary grounds. The "Response" contended only that it should be dismissed on the ground that the decision was not affected by jurisdictional error. The appellant was entitled to, and did, approach the hearing on the basis that the only matter in issue before the Federal Circuit Court was whether the decision was affected by jurisdictional error.

37. The Court never raised any suggestion that the appellant or his representatives might be found to have lacked "good faith or genuineness". Nor did the Court ever even mention that it was considering refusing relief in the exercise of its discretion.

38. Had the appellant's representatives known that there was any risk of such a finding being made, evidence might have been obtained and led from the appellant and/or his previous advisers as to their understanding of the law, the effect of the appellant being found to be stateless, the reasons why the claim

had been framed with respect to Sri Lanka rather than India, and whether the appellant claimed a genuine fear of harm in respect of India. Because the appellant was not on notice of these matters, and could have led evidence in respect of them, it was inappropriate for the Court to draw the adverse conclusions it did and to decline relief on discretionary grounds as it did.

39. The practical effect of the refusal of relief is that the appellant is entirely denied any opportunity to have a protection visa application decided in accordance with law or by reference to the correct reference country. If the decision stands, the appellant is liable to detention and removal (should removal be reasonably practicable, which is unclear), or otherwise indefinite detention, without the required assessment ever having been made.

(Citations omitted.)

88 In response the Minister submitted:

22. Despite finding that the error was jurisdictional, the FCC refused relief on discretionary grounds, namely, that the appellant had never prosecuted a case based on India as the relevant receiving country (SAB 372 [50]). As a fact, that is correct; the appellant did not make a protection claim directed to India as the relevant receiving country. Further, it cannot be suggested that the appellant was not alive to the fact that the case presented in relation to the assessment under s 36(2) of the Migration Act in the FCC was indeed different to the claim pressed under that provision before the delegate and the IAA. Accordingly, the appellant having (quite properly) made it plain before the FCC that his case had changed from the case which was presented to the IAA, the appellant cannot now complain that the FCC was not permitted to determine the case before it in light of that material change. Put another way, the appellant ventilated the change in the case before the FCC and therefore had an opportunity to make any submission, at that time, about the consequences that flowed from that change in approach. cf *Minister for Immigration and Border Protection v AMA16* (2018) 254 FCR 534 at [57] (Griffiths J), [97] (Charlesworth J).

23. Moreover, it cannot be suggested that the refusal of relief on discretionary grounds is a matter that emerges from nowhere. It is well accepted that relief in judicial review proceedings is discretionary. If the appellant was self-represented, that fact may have needed to have been mentioned expressly by the FCC. However, viewed in context, the better view is that the combination of the fact that the appellant was alive to the fact that the case presented before the FCC was not the case that was pressed before the IAA, coupled with the fact that he was represented by a solicitor and counsel aware of the fact that relief is discretionary, was sufficient for the FCC to refuse relief. Of course, the Minister respectfully submits that the FCC's *prior* findings were incorrect, and should be overturned, which, if successful, would render the issue of the underlying premise for refusing relief on discretionary grounds irrelevant.

Consideration

Appeal is from a discretionary decision

89 A threshold question is whether the principles of *House v The King* [1936] HCA 40; 55 CLR 499 (***House***) apply in respect of the Appellant's attack on the primary judge's exercise of

discretion not to grant relief by way of the issue of a constitutional writ. We think they must. His Honour was exercising a discretion available to him. It is inherent in the exercise of a discretion that there is a permissible range of decisional freedom. If a decision falls within the permissible degree of decisional freedom an appeal court must respect the conclusion reached by a primary judge. The limited circumstances in which a discretionary decision may be challenged on appeal appears in *House* at 505:

> If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance.

90 In respect to whether the primary judge can be concluded to have mistaken the facts, the principles essayed in *Fox v Percy* [2003] HCA 22; 214 CLR 118 apply.

91 Those limits acknowledged, FER17's appeal must be upheld.

Limited basis for exercise of discretion

92 None of the circumstances that Edelman J refers to at [30] in *Hossain* (cited by the primary judge at [48] of his Honour's reasons) have been submitted to have any application, save "bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made". In any event, we are satisfied that none applied.

93 There was no "unwarrantable delay".

94 There was nothing to suggest, and nor did the primary judge proceed on the basis, that "no useful result could ensue". It may be accepted that having regard to the materials that were before the IAA as had been automatically referred to it under Pt 7AA of the Act, the Appellant's protection claims in respect of India were unpromising. However, the primary judge's conclusion that the IAA's error was material (which is not challenged) must stand for the proposition that, had the IAA understood and applied itself to its task according to law, FER17's claims for protection, assessed against India as his receiving country, were not so frail as to justify the conclusion that they would have incontestably failed.

95 Moreover, should FER17's review be remitted back to the IAA there will be nothing to prevent him from asking the IAA to give consideration to additional information relevant to India which he might give it. He could do so on the premise that in exceptional circumstances the IAA is entitled to consider new information pursuant to s 473DD of the Act, and that the earlier mutual misunderstanding that his claims were to be assessed with respect to Sri Lanka is such a circumstance. There is no basis for this Court necessarily to assume that the IAA would reject such a contention.

Was there a basis for finding that the Appellant lacked "genuineness or good faith"?

96 The Court therefore turns to the reasons the primary judge gave for the exercise of his Honour's discretion to refuse relief on the basis of a finding (at [50]) that the appellant appeared to lack "genuineness or good faith".

97 The primary judge expressed concern that the Appellant had not made a claim in relation to India to the IAA (at [49] of his Honour's reasons).

98 However, as matter of law and fact that was incorrect. FER17's review in the IAA was required to be conducted pursuant to the fast-track mechanism provided for in Pt 7AA of the Act. Such a review was automatic upon the refusal of his application by the Minister's delegate. The claims the IAA had been required by law to consider in its review were those made by the Appellant as had been rejected by the delegate.

The Appellant did not mislead the IAA

99 FER17 did not assert in his submissions to the IAA that he was a national of Sri Lanka. His case remained, as he had advanced it before the Minister's delegate, that he was effectively stateless.

100 FER17 had advanced claims for protection relating to India before the delegate. The delegate had rejected those claims and had affirmed the decision to refuse him a protection visa.

101 When FER17's claims were automatically referred to the IAA for review, all of his rejected claims came before the IAA.

102 It was not open to the primary judge to reason that FER17's claims with respect to India were "belated" (as his Honour did at [50]). They were not. All of FER17's claims, as advanced to the Minister's delegate, were, from the beginning, before the IAA.

103 Even accepting that the primary judge was entitled to conclude that the Appellant, having received legal advice, was being opportunistic in taking advantage of the IAA's error, the Appellant had not induced, or otherwise been responsible for that error. His conduct did not justify a finding of want of genuineness or good faith.

104 Mr O'Leary submits that that this Court should construe the primary judge's reasons as if no finding of moral obloquy was made. Read in the context of his Honour's reference to Edelman J's remarks in *Hossain*, we reject that it is open for us to do so.

105 The primary judge erred in principle when his Honour refused to grant discretionary relief.

106 Having regard to that conclusion, it is unnecessary for the Court to give attention to the ground of appeal advanced on the basis of procedural fairness. However, we note that the Minister accepted that a finding of bad faith is not open to be made without hearing from a party in relation to the matters upon which such a finding might be made. Mr O'Leary further accepted that he could make no robust defence of the primary judge's finding of bad faith insofar as it suggested moral obloquy or some sort of dishonesty or fraud.

107 Accordingly, the appeal must be upheld.

DISPOSITION

108 The cross-appeal is dismissed. The appeal is allowed and the orders of the FCCA are set aside. Orders in the nature of constitutional writs must issue requiring the decision of the IAA to be set aside and the review remitted to it, to be heard and determined according to law.

109 The Minister is to pay the Appellant's costs in this Court and in the FCCA.

I certify that the preceding one hundred and nine (109) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Kerr, White and Charlesworth.

Associate:

Dated: 24 June 2019